No. 96-889 (2)

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

PRINCE GEORGE'S COUNTY MARYLAND, *et al.*,

Petitioners,

v.

MARC ALEXANDER, *et al.*,

Respondents.

On Petition of a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

In the instant case, the Court of Appeals struck down a race- and gender-based hiring system, maintained by the Fire Department of the Petitioner County, that had been implemented in the mid-1980s and had continued long beyond its usefulness for eradicating past discrimination. The Court of Appeals based its decision on the application of equal protection scrutiny to the hiring system.

Petitioners ask this Court to grant a writ of certiorari in this matter because, they contend, the Court of Appeals misapplied the law of equal protection to the facts of this case. *See* Petition for Writ of Certiorari at 11. Supreme Court Rule 10 provides, however, that a petition for a writ of certiorari is "rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Because there is no compelling reason to grant the writ, and because the Court of Appeals did not misapply the law, certiorari should be denied.

CORRECTIONS TO PETITIONERS' FACTUAL AND PROCEDURAL STATEMENTS

Mindful of the admonishment in Supreme Court Rule 15.2, Respondents note the following corrections to Petitioners' statements.

First, contrary to Petitioners' claim, *see* Petition for Writ of Certiorari at 13 & 15, the Court of Appeals did not "accept" that the Petitioners proven that the Fire Department's hiring practice was justified by a compelling interest in remedying past discrimination. Rather, the Court of

Appeals noted that the parties disagreed as to whether the Petitioners had shown a compelling interest, and declined to rule on that issue, proceeding instead to strike down the race- and gender-based system as insufficiently related to the Department's allegedly compelling interests to survive constitutional muster. *See id.* at A-8 - A-9.

In fact, the record strongly supports the conclusion that race- and gender-based hiring was adopted and/or continued for political reasons instead, to attempt to mimic the changing voter demographics in the County. *See, e.g., id.* at 3 & A-5.[1] Further, the anecdotal evidence did not document race and gender hiring discrimination "throughout [the Fire Department's] history," *id.* at 7, but rather showed race and gender harassment of employee and volunteer firefighters in the 1970s and early 1980s, and even then, primarily at the volunteer firefighter stations, not at the Department.

The Court of Appeals never "accepted the District Court's findings . . . that the Plan was limited in duration, was flexible, did not impose quotas, and did not impinge inappropriately upon the rights of non-minorities," as claimed by Petitioners. *See id.* at 15. Acceptance of such findings would have been contrary to the evidence: Because Petitioners' "hiring goals" changed as the County's demographics changed and because the trends in the County indicate that these demographics are continually changing, *see id.* at A-5,

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[1] In 1974, when the Fire Department embarked on a minority recruitment program, the County's labor force was 17% minority. In 1984, when the Department began its practice of hiring based on race and gender, the Department was 20% minority. At that time, the Department established a new goal that 39% of its firefighter workforce be minorities to reflect the 1980 census figures for the County.

the reality is that the hiring practice was limitless in duration.[2] The Department had established no waiver provisions, and instead imposed rigid quotas on the number of white males who could be hired each recruit class, *see id.*, even going so far as to leave a position unfilled when a qualified nonminority candidate could not be located. The Department did impose quotas -- not on the number of minorities and women, but on the number of white males -- and whether one calls them "informal caps", *id.* at n.3, or "quotas", the meaning is the same. Finally, the hiring practice did impinge upon the rights of nonminorities: Nonminorities were denied an equal opportunity to compete for jobs solely because of their skin color and gender.

The Court of Appeals did not base its holding that the practice was not narrowly-tailored solely on the hiring system's overinclusiveness. *See id.* at 5. Rather, the Court of Appeals assumed *arguendo* that the practice was intended to serve a compelling interest and held that it nevertheless violated the Constitution because it was not narrowly-tailored in at least the following three respects: (1) less drastic means than racial classifications could have been used to achieve the interests alleged, in that the preference for volunteer firefighters, when the volunteer firefighting departments were the locus of past discrimination, could have been suspended; (2) among those benefitted at the expense of nonminority candidates were Hispanic and Asian minorities who had never suffered past discrimination by the Department, and thus no compelling interest was served by their inclusion; and (3) the

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[2] Having come by 1993 within one percentage point of achieving its goal of 39% minority firefighters, the Department declared its intention to establish a new goal of 57.5% minority based on the 1990 census.

practice was unwritten and thus not capable of being applied in a fair and consistent manner. *See id.* at A-8 - A-9.[3]

ARGUMENT

1. There is No Compelling Reason to Grant the Writ.

The law of equal protection has been clear since 1989, if not before, that race- and gender-based affirmative action hiring must comport with equal protection principles. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). The standard for race-based hiring is strict scrutiny, which requires that the program be narrowly tailored to serve a compelling government interest. *Id.* There is nothing "will-o'-the-wispish", Petition for Writ of Certiorari at 3, about this standard, which has been reiterated many times in this Circuit both before and after 1989. *See, e.g., Hayes v. North State Law Enforcement Officers Ass'n,* 10 F.3d 207 (4th Cir. 1993); *Maryland State Troopers Ass'n, Inc. v. Evans,* 993 F.2d 1072 (4th Cir. 1993); *Podberesky v. Kirwan,* 956 F.2d 52 (4th Cir. 1992); *City of Richmond v. J.A. Croson Co.*, 822 F.2d 1355 (4th Cir. 1987), *aff'd* 488 U.S. 469 (1989).[4]

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[3] The County had issued a County-wide written Affirmative Action Plan that set goals and outlined implementation strategies, none of which involved race- or gender-based hiring. Nothing in the written Plan was challenged by Respondents; rather, it was the Department's unwritten practice of capping the number of white males in each recruit class that was challenged, and was held unconstitutional by the Court of Appeals.

[4] Whether or not *Croson* was adequate to put a reasonable official on notice of the Constitutional requirements that an

The Court of Appeals did not "misconceive" the applicable law, as asserted by Petitioners, *see* Petition for Writ of Certiorari at 10, but rather applied the governing law to the instant facts, and did so correctly. Nothing in any of the precedents cited by Petitioners supports the grant of a writ of certiorari where, as here, the Court of Appeals properly understood the law.

The standard for gender-based hiring is somewhat less clear, both in the Court of Appeals decision below and in the governing jurisprudence generally. *Compare, e.g., United States v. Virginia,* __ U.S. __, 116 S. Ct. 2264, 2275 (1996) (applying intermediate scrutiny to gender-based classifications), *with, e.g., Adarand Constructors, Inc. v. Pena,* __ U.S. __, 115 S. Ct. 2097, 2103 (1995) (analyzing under strict scrutiny a disadvantaged business enterprise program that gave preferences to minorities and women). Nevertheless, the requirement that, at a minimum, the means used by an affirmative action Plan for women must be closely related to the ends is plainly good law. This was the test used by the Court of Appeals, *see* Petition for Writ of Certiorari at A-8 ("[T]he means chosen by the department [were] not related

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affirmative action program must meet, these cases in the Fourth Circuit certainly provided more than adequate notice. Thus, contrary to the statements made by the petitioners in their petition for a writ of certiorari in the case *Erwin v. Daley*, 92 F.3d 521 (7th Cir. 1996), the opinion of the Court of Appeals in this case does not conflict with the opinion of the Seventh Circuit in that case. Further, the Petitioners here do not raise the denial of qualified immunity as a question presented in their Petition, and therefore this Court should not grant the writ on the basis of some hypothetical conflict with the Seventh Circuit's holding on qualified immunity in *Erwin*.

closely enough to the interests asserted."), and the Court applied the test properly.

2. The Court of Appeals Did Not Err in Declaring Unconstitutional the Prince George's County, Maryland Fire Department's Affirmative Action Hiring Practice.

Whether or not a compelling reason existed for race-based hiring in 1993 and 1994, the Court of Appeals properly held that the hiring practice chosen by the Department was not sufficiently closely related to this allegedly compelling end.

Hiring members of minority groups that have not suffered prior discrimination by the Department ahead of more qualified white males is not only not substantially related to the asserted goal of remedying past discrimination against African-Americans and women, it is entirely unrelated to that alleged goal. The fact that these "other" minorities did not suddenly appear in the Department ranks in lock-step proportion to their residency rate in the County is not even statistically sound evidence of societal discrimination,[5] never

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[5] This is so for at least two reasons: (1) the rate at which a group moves into a county should be compared to the rate of hire, not the already-hired workforce (for example, if all the Asians moved into the County in 1990, but the Department had not hired anyone new in 1990, then the resultant disparity between the population and the Department's workforce in 1991 has no statistical significance); (2) the sample sizes involved are too small to generate statistical significance (very few recruits per class and very few "other" minorities in the population). Further, there was no evidence placed in the record about whether personal predilections for firefighting or physical and educational qualifications for firefighting occur at the same rates for all groups.

mind legally sound evidence of lingering effects of discrimination at the Department. *Cf. Croson*, 488 U.S. at 505-06 (societal discrimination is insufficient to justify race-based hiring; such hiring is only constitutional when it is based on proven lingering effects, at the hiring entity, of discrimination). The fact that only a "handful" of "other" minorities benefitted from the Plan, *see* Petition for Writ of Certiorari at 16, does not excuse the unconstitutional practice; each and every one of those "other" minorities hired represents a job denied, on the basis of gender and skin color, to another applicant. Indeed, Respondent Reedy was passed over to favor a "male other" who Petitioners "believe" was Asian.

Utilizing a race- and gender-based hiring system before suspending the volunteer preference, when the volunteer fire departments were the locus of the alleged prior discrimination and harassment, is plain evidence of insufficient tailoring.[6] The Court of Appeals did not demand that the Department try every alternative under the sun before using race- and gender-based affirmative action hiring, but did demand, properly, that the Department at least try the option approved by the County itself to remedy disparate hiring -- suspending the

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[6] Although Petitioners now appear to claim that the volunteer fire departments do not discriminate, *see* Petition for Writ of Certiorari at 19, this position conflicts with their claim that past discrimination in volunteer companies still lingers to such an extent that race- and gender-based hiring is necessary. Petitioners cannot have it both ways. Either the effects do not linger, in which case the hiring practice is unconstitutional because it does not serve an important or compelling government interest, or the effects do linger, and suspending the volunteer preference must be attempted before implementing race- and gender-based hiring.

volunteer preference.[7] To ignore the option already approved by the County for this purpose demonstrates a lack of "good faith consideration of race-neutral alternatives," *see* Petition for Writ of Certiorari at 18 (quoting *Coral Constr. Co. v. King County, Washington*, 941 F.2d 910, 923 (9th Cir. 1991), *cert. denied,* 502 U.S. 1033 (1992)), which even Petitioners admit is required to pass constitutional muster.[8]

The unwritten nature of the hiring practice further rendered it insufficiently tailored to its alleged ends. For example, Petitioner Hennessey was initially instructed to hire no more than four white males and at least five women for the June 1993 recruit class of thirteen, but when her boss was replaced, she was told that five women were not required, so that she could hire an additional minority male. Race- and gender-based hiring that is so amorphous that the quotas on white males or the relative weight to be given the gender of a white woman applicant versus the race of a black male

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[7] Under Prince George's County Ordinance, § 16-162(4), the County Personnel Officer may suspend the volunteer firefighter preference upon determining in writing that the preference has a disparate impact on a protected class.

[8] Although Respondents have no reason to doubt that volunteer experience is beneficial to firefighting, the decision by the County to pass over white male applicants with volunteer experience in favor of minority and women applicants without such experience, proves that the Plan here was costly not only to the applicants who were denied jobs on the basis of their gender and ethnicity, but was also costly to firefighting in the County. In addition, the Petitioners failed to show that other race-neutral practices were ineffective. As early as 1984, as a result of aggressive recruitment practices, two-thirds of the firefighter applicants were minorities.

applicant, changes at the whim of an administrator, is *per se* unconstitutional for lack of a clear relationship between the race- and gender-based methods used and the alleged ends of rectifying past discrimination. Indeed, because the unwritten practice consisted solely of hiring to meet certain race and gender goals as set for each recruit class, there were no boundaries at all. In furtherance of the goals, the Department passed over white males and, in one instance, a white female, who were ranked higher by statutory preference than the persons actually hired. But nothing in the unwritten practice limited Petitioners only to ignoring preferences. Those charged with meeting the hiring goals had "*carte blanche*" -- the converse of "narrowly tailored."[9]

Finally, the Court of Appeals quite properly relied on its precedents in coming to the conclusion that the Department's practice was not sufficiently closely related to the alleged ends to pass constitutional muster. *Hayes v. North State Law Enforcement Officers Ass'n,* 10 F.3d 207, and *Maryland State*

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[9] For this reason, the instant case is distinct from *Piscataway Township Bd. of Ed. v. Taxman*, 91 F.3d 1547 (3d Cir. 1996), because in that case, the hiring practice was narrowly defined as choosing a minority over a nonminority employee when both were of equal seniority and qualifications. In the instant case, there is no limit on the test score and statutory preference rankings that can be ignored in limiting white male hires. This case also does not present the question presented in the Petition for Certiorari in *Taxman* of whether the provision of minority and women role models can be a compelling government interest, because in this case, the Fourth Circuit found Petitioners' practice insufficiently tailored irrespective of whether a compelling interest was shown. Further, Petitioners here do not raise the role model issue as a question presented in their Petition, and therefore this Court should not grant the writ here on the basis of some hypothetical conflict with the Third Circuit's holdings in *Taxman*.

Troopers Ass'n, Inc. v. Evans, 993 F.2d 1072, both elaborated upon the strict scrutiny standard for race-based employment decisions established by *Croson*. The strict scrutiny standard is the same for all race-based employment decisions, including both hiring and promotions. *Podberesky v. Kirwan,* 956 F.2d 52, analyzed a state university's scholarship-granting policies, where some scholarship funds were available to all races and genders, and some scholarship funds were limited to minorities. In the instant case, there are some positions available to all races and genders (the quota or "capped" number), and the remainder are available only to minority and female applicants. Thus, *Podberesky* is analogous to the instant case, and the Court of Appeals properly looked to that case in analyzing this case.

3. The Court of Appeals Did Not Err in Declaring Unconstitutional the Gender-Based Component of the Prince George's County, Maryland Fire Department's Affirmative Action Hiring Practice.

Although the Court of Appeals was not terribly explicit in so doing, its striking of the gender-based component was nevertheless mandated by Equal Protection. Arguably, gender-based affirmative action hiring is subject to intermediate scrutiny, such that the gender-based hiring is constitutional if it is substantially related to serving an important governmental interest. *See United States v. Virginia*, __ U.S. at __, 116 S. Ct. at 2275. However, even with this weaker standard than that required for race-based affirmative action, the hiring practice does not meet this test.

Even assuming, *arguendo,* that the government interest in 1993 and 1994 in hiring based on gender was important, "the means chosen by the department [were] not related

closely enough to the interests asserted." Petition for Writ of Certiorari at A-8. The Court of Appeals correctly pointed to three ways in which the hiring practice was not sufficiently tailored to achieve either the race-based or gender-based interests asserted: failure to suspend volunteer preference, overinclusiveness, and unwritten nature. *Id.* at A-8 - A-9.

Regarding gender however, there are additional ways in which the system of race-and gender-based hiring was not substantially-related to the asserted goal of remedying past discrimination. For example, the preference for veterans, for which the County has given no justification, and which despite recent demographic changes in the armed forces still operates against women, was not eliminated. Further, Petitioners have proffered no evidence of attempts short of gender-based hiring to convince more qualified women to join the force, such as through sex-discrimination education, prompt and well-publicized disciplinary actions against harassers, etc. Although Petitioners presented evidence of harassment of women in the 1970s and early 1980s, gender-based hiring is not substantially related to fighting sexual harassment. Although the relationship between the means (gender-based hiring) and the ends (eliminating harassment) is probably rational, it is not substantial, and thus fails intermediate scrutiny. Two constitutional wrongs do not make a constitutional right. *See, e.g., Ensley Branch NAACP v. Seibles*, 31 F.3d 1548, 1572 (11th Cir. 1994) (refusing to accept the "institutionalized discrimination" created by an employment plan that permits a government employer to continue to use discriminatory hiring criteria "and then attempt to cure the resulting injury to [the group discriminated against] with . . . affirmative action").

CONCLUSION

Petitioners' assertion that the Court of Appeals misapplied existing law is mistaken. The hiring practice of Petitioners fell short of the plain meaning of strict scrutiny, and the reasoning expressed by the Court of Appeals sounds no note discordant with the directions issued by this Court.

For the foregoing reasons, Respondents respectfully request that this Court exercise its discretion to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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